

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-2138

IN THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOTT DAVID DUNKERELY,
Petitioner-Appellant

v.

CORNELIUS HOGAN, in his official capa-
city as Commissioner of Corrections
for the State of Vermont and RICHARD
BASHAW, in his official capacity as
Superintendent of the St. Albans Cor-
rectional Center,
Appellees

DOCKET NO. 77-2138

ON PETITION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Use short title)

Scott David Dunkerley

v.

Cornelius Hogan, et al

MOTION BY:

(Name and telephone number) Susan R. Harritt
802-828-2204

IS OPPOSITION ANTICIPATED: ☒ Yes ☐ No ☐ Unknown

HAS SERVICE BEEN MADE: ☒ Yes ☐ No

IS ORAL ARGUMENT DESIRED: ☐ Yes ☒ No
(Substantive motions only)

REQUESTED RETURN DATE:
See Second Circuit Rule 27(b)

DATE ARGUMENT OF APPEAL SCHEDULED:

JUDGE OR AGENCY WHOSE ORDER IS BEING APPEALED: Judge Mansfield

BRIEF STATEMENT OF THE RELIEF REQUESTED:

Petition for rehearing and reconsideration of the appeal before the panel, or,
in the alternative, in banc.

PREVIOUS REQUESTS FOR SIMILAR RELIEF AND DISPOSITION:

None.

STATEMENT OF THE ISSUE(S) PRESENTED BY THIS MOTION:

The declaration of a mistrial sua sponte due to the sudden, unforeseeable
physical incapacity of the defendant bars the application of the Double Jeopardy
Clause.

BRIEF STATEMENT OF THE FACTS, with page references to the moving papers:

SUMMARY OF THE ARGUMENT, with page references to the moving papers:

DOCKET NUMBER 77-2138

NOTICE OF MOTION FOR
(State type of motion)

Petition for Rehearing by the Panel
or in Banc

OPPOSING COUNSEL:

(Name and telephone number) James L. Morse
802-828-3168

EMERGENCY MOTIONS, MOTIONS FOR STAYS
& INJUNCTIONS PENDING APPEAL

HAS REQUEST FOR RELIEF BEEN MADE BELOW?
(See F.R.A.P. Rule 8) ☐ Yes ☐ No

WOULD EXPEDITED APPEAL ELIMINATE NEED
FOR THIS MOTION? ☐ Yes ☐ No
IF NO, EXPLAIN WHY NOT:

6/26/78

Date

Print Name:

Susan R. Harritt
signature
Susan R. Harritt

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PETITION FOR REHEARING

Pursuant to the provisions of Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure, Cornelius Hogan et als, the above-named appellees, respectfully suggest to the judges of this Honorable Court that the above-entitled cause is appropriate for consideration on rehearing by all the judges of this Court convened in banc, or, in the alternative, for a rehearing and a reconsideration of the appeal in the above-entitled cause. In support of this petition, petitioner shows the Court as follows:

1) The Circuit Courts are in disagreement concerning the nature and effect of physical incapacity of an essential participant in a criminal prosecution on the trial process. As evidenced by the cases cited herein, the Third, Fourth, Fifth and Ninth Circuits treat the physical incapacity of a primary participant as a cause of manifest necessity resulting in a mistrial and a subsequent retrial.

2) The Second Circuit majority opinion which holds that the physical incapacity of the defendant does not trigger the Perez doctrine which permits retrial runs counter to the Circuit's earlier treatment of the subject in United States v. Potash, 118 F.2d 54 (2nd Cir. 1941).

3) The majority opinion is contradicted by Vermont precedent as set forth in State v. Emery, 59 Vt. 84, 7 A.129 (1887). Clearly the decision of the trial judge was in harmony with his own state case law.

4) The majority opinion is also inconsistent with United States Supreme Court holdings and dicta as illustrated by the cases cited in petitioner's argument. Given the lack of specific guidance under the Perez approach, the presence of language found

in cases from 1823 through the present becomes critical to a trial judge placed in an unforeseeable situation.

5) The Second Circuit opinion also raises the need to resolve the conflict now existent between Arizona v. Washington, 46 U.S.L.W. 4127 (1978) and its own opinion. The Circuit opinion appears to place undue weight on ritualistic language when, in fact, the mechanistic approach to this area has been historically and consistently decried.

6) The Circuit opinion also fails to acknowledge the variation in the level of scrutiny appropriately to be directed at the trial judge's exercise of sound discretion. This flexibility, as discussed in Arizona v. Washington, supra, is consistent with the policies inherent in the Double Jeopardy Clause when the reason for the interruption of the trial process is not engendered by judicial overreaching or prosecutorial negligence or misconduct.

7) The opinion also contains two factual inaccuracies which create a misapprehension in the review of judicial discretion. The trial judge considered for approximately one hour and forty-five minutes the physician's reports and the suggestions of counsel. Since he was not able to know with the exactitude required by the situation when the defendant would regain his health, the judge determined that a mistrial was appropriate. The defendant's actual recovery period does not bear retrospectively on the trial judge's exercise of sound discretion.

Wherefore, petitioner respectfully requests that the Honorable Judges of this Court grant this petition and order that the above-entitled proceeding be set for rehearing in order to resolve the differences between the conflicting State and Circuit opinions and also to clarify an exceptionally important area of the law.

EDITOR'S NOTE

Pages 3 were missing at time of filming. If, and
when obtained, a corrected fiche will be forwarded to you.

shortly before 9 o'clock in the morning. (App. Pr. C. p.12 11 5-9). The record reveals that the judge engaged in at least four phone conversations with the various physicians involved in assessing the defendant's condition. (App. Pr. C. p.12 11 9-14, Pr. C. p.12 11 23, p.13 11-14). The court also appointed a physician to examine the defendant for the court. As stated in the appellee's brief in its statement of facts, the judge convened three conferences with counsel during the course of the morning. (App. Pr. C. pp.12, 15, 20). During these conferences suggestions were invited from counsel and these alternatives were discussed. Thus the court considered the problem posed by the defendant's sudden incapacity for at least one hour and forty-five minutes. The length of deliberation by the court impacts upon the sound exercise of discretion required of the trial judge by United States v. Perez, 9 Wheat, (22 U.S.) 599 (1824) and the constitutional guarantees contained in the Fifth Amendment.

LEGAL ARGUMENT

Incapacity of any essential member of the trial proceeding has traditionally been thought to block the imposition of the double jeopardy bar against reprosecution. In Vermont the Supreme Court has commented on the effect of the Double Jeopardy Clause on retrial when the jury was discharged following the illness of a juror.

But in the event the jury, or court, or prisoner, in the progress of the trial, become unable to proceed with the trial, his jeopardy at once ceases. If it were known when the trial was entered upon that the judge would be stricken down or die, so that there would be no competent court to finish the trial; or that the panel would become disqualified by the sickness or death of one of the jurors; or that the jury would be unable to find a verdict; or that the respondent would be unable to proceed with the

trial because of sickness or escape from custody, the respondent would not be put in peril or jeopardy by such commencement of the trial. State v. Emery, supra.

This same result has been obtained in numerous federal and state cases. Manifest necessity was found in United States v. Haskell, 26 F.Cas. 207 (No. 15321) (E.D. Pa. 1823) when a juror became insane during a trial proceeding. As a result of this unforeseeable circumstance retrial was permitted. In United States v. Bigelow, 14 D.C. (3 Mackey) 393, 401, the court opined that the death or incapacity of the trial judge did not call for the imposition of a double jeopardy bar to reprosecution.

This issue has been examined in United States v. Potash, 118 F.2d 54 (2nd Cir. 1941), wherein a juror became ill. As a consequence the jury was discharged by the sua sponte order of the judge without the defendant's consent. There the Second Circuit upon review declared that the matter of jury discharge is one within the sound discretion of the trial court; as such the defendant must carry the burden of proving his plea of double jeopardy.

The Second Circuit has reviewed a somewhat analogous claim in Bernstein v. Travia, 495 F.2d 1180 (2nd Cir. 1974), wherein the trial judge was faced with a request for a continuance from the defendant in light of his claim of physical incapacity stemming from a heart condition. The Court found that the decision to grant a continuance or a severance

carries with it the tremendous responsibility of weighing the invariably unpredictable factor of a defendant's health against the Government's indeed the public's legitimate interest in a fair and speedy disposition. Troublesome though it may be, however, that decision, as we have repeatedly held, (citations omitted), is one reserved to the sound discretion of the district judge. Bernstein v. Travia, supra at 1182.

In United States ex rel Gibson v. Ziegele, 479 F.2d 773 (3rd Cir. 1973), the reviewing court applied the standards of manifest necessity and public justice to a record which reflected the unexpected illness of a key government witness whose incapacity was predicted to last one to two weeks or more. The Third Circuit commented that the defendant's right to case resolution "by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837 (1949). Of further interest is the court's view that the trial judge is not under an obligation to explore unlikely alternatives to a mistrial on his own initiative.

The Fourth Circuit has touched on the interpretation of the Double Jeopardy Clause in the mistrial context in Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1121 (4th Cir. 1973). In ascertaining whether manifest necessity existed, the court acknowledged a difference between absolute necessity and manifest necessity in light of the Perez concept of public justice. Interestingly the Whitfield court cites as examples of clear and absolute manifest necessity the Perez problem of jury deadlock and the Potash predicament of juror incapacity. In Whitfield the court found that manifest necessity to declare a mistrial existed in spite of the existence of a solution--substitution of the alternate juror. The reviewing court afforded the trial judge the exercise of his discretion.

In United States v. Wyman, 510 F.2d 1020 (5th Cir. 1975) the trial court was faced with injury to defense counsel once trial had commenced. The court found applicable language from Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523 (1961) which

read as follows:

Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objections and he may be retried consistently with the Fifth Amendment. Gori v. United States, supra at 368.

Further support for the proposition that physical incapacity of unforeseeable origin does not bar a second trial is found in Featherston v. Mitchell, 418 F.2d 582 (5th Cir. 1970). There in spite of the defendant's objection, the trial judge's exercise of discretion was not overturned when the defendant's mental condition prompted jury termination.

In Loux v. United States, 389 F.2d 911 (9th Cir. 1968) the court found that the declaration of a mistrial on the same day of an accident involving injury to a defendant was a matter properly within the sound discretion of the trial court. The mistrial declaration was consistent with the case law compiled in 159 ALR 750.

This same rule has been advanced in Oelke v. United States, 389 F.2d 668 (9th Cir. 1967) wherein physical incapacity of a juror, the judge, or the accused was treated analogously to jury deadlock, (United States v. Perez, supra, and to jury bias (Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171 (1891)).

Health considerations have been peripherally mentioned in United States v. Jorn, 400 U.S. 479, 91 S.Ct. 547 (1971).

[A] criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, e.g. the health of the various witnesses, parties, attorneys, jurors, etc. all of whom must be prepared to arrive at the courthouse at set times.... it becomes readily

apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide. United States v. Jorn, supra at 554.

Various state cases also hold that physical incapacity to a principal party creates a manifest necessity obviating the double jeopardy shield. See State v. Maloux, 199 Tenn. 496, 287 S.W.2d 79 (1956) (death of a juror); Woodward v. State, 42 Tex. Crim. 188, 58 S.W.135 (1900) (serious illness in juror's family); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 cert. den. 423 U.S. 934 (1975) (illness of judge); Glover v. United States, 301 A.2d 219 (D.C. 1973) (illness of defendant); State v. Kirby, 236 S.E.2d 33 (1977) (death of the prosecutor during the trial).

In light of the pervasive support for the declaration of a mistrial in the instant factual situation, particularly given Vermont and Second Circuit precedent, the trial judge had ample justification on the record to support his mistrial declaration.

While the majority opinion is fully cognizant of the standards articulated in the seminal case of United States v. Perez, supra, as evidenced by the reference to both manifest necessity and the ends of justice on page 3326 of the opinion, the Court appears to ignore the standard relating to the ends of justice in its further discussion of the case. In United States v. Perez, supra, Justice Story considered, as a consequence of all the surrounding circumstances, whether manifest necessity or the ends of public justice barred the application of the Double Jeopardy Clause.

The majority delineated their task as the reviewing court to determine whether the basis for the trial judge's mistrial order in this case was adequately disclosed by the record. In considera-

tion of that query the majority appears to have blurred the boundaries of that inquiry with the task posited in their second line of scrutiny. That line, as it was expressed on page 3329, involved a review to determine if the trial judge's exercise of discretion was sound. The Court at the outset fails to consider the guidance provided in the seminal case of United States v. Perez, supra, the fountainhead of the law in matters of mistrial on double jeopardy. By noting that the trial court failed to make an explicit finding of manifest necessity, the Court ignored the multiple references to the interests of justice. (See Pr. C. pp.20, 22, 23).

Moreover, in the recent case of Arizona v. Washington, 46 U.S. L.W. 4127 (1978), the Supreme Court held that

[t]he state trial judge's mistrial declaration is not subject to collateral attack in a federal court simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion. 46 U.S.L.W. at 4132.

The basis for the declaration is obviously not susceptible to categorization by a higher court. Reliance on a mechanistic rule listing the circumstances under which a mistrial should be granted has been rejected in United States v. Perez, supra, and its progeny. The Court, however, by way of example revealed some of the various permissible bases for mistrial and reprosecution when it took note of United States v. Perez, supra (jury deadlock); Keerl v. Montana, 213 U.S. 135 (1909) (jury bias), and other cases noted on page 3328. The inclusion of these examples does not provide an exhaustive list of all grounds for mistrial and reprosecution. While legal precedents aid in defining situations of manifest necessity causing a mistrial in the ends of public justice,

the trial judge in the individual case must determine whether the Perez doctrine applies to excuse the double jeopardy bar.

The judge clearly considered the problems inherent in a trial interrupted by a period of time at minimum of seven to ten days. Since the interruption occurred on the morning of the third day of trial and the anticipated hiatus was to last some ten days, the court felt the continuance was an unacceptable alternative.

This is a very serious case that from all indications as the cases preceding it, it will not be a very lengthy case when it is ultimately tried.... (Pr. C. p.20).

The court also found that illness was not proper under the V.R.Cr. P.43 voluntary absence provision. The reasoning process behind the decision for a mistrial while not fully articulated is revealed in a record replete with what the judge considered justification for declaring a mistrial in the interest of justice. It is also argued that having determined that there existed a justification for a mistrial declaration, the trial judge also properly exercised his sound discretion when he reviewed the alternatives to a mistrial and decided that the mistrial declaration was the solution which served the interests of justice.

In a more generalized context the granting or denial of a continuance has been left to the discretion of the trial judge. United States v. Knohl, 379 F.2d 427, 437 (2nd Cir. 1967). This same discretion is afforded in the area of sequestration. United States v. Breland, 376 F.2d 721 (2nd Cir. 1967). The Breland opinion cites with approval Hines v. United States, 365 F.2d 649 (10th Cir. 1966). In Hines, as in Breland, the jury was permitted to separate after the evidence was all in and in the midst of jury deliberations at the close of the day. The jury regrouped the following morning and continued their deliberations until a ver-

dict was reached. There the separation was for a brief period. The decision to allow a separation and by analogy, to deny dis-equestration once it has been instituted rests with the court.

The possibility of interference, deliberate or inadvertent, is, of course, increased when the jury separates.... The trial court must be guided in its action by a comparison of the alternatives in the light of the circumstances surrounding the trial and the parties. Both the defendant and the public have an interest that risks be not unnecessarily created. Hines v. United States, supra at 651.

The exercise of this discretion like that exercised by the trial court in general is subject to challenge only upon a showing of abuse. Holt v. United States, 218 U.S. 245, 31 S.Ct. 2 (1910).

In Vermont the area of sequestration is unlimited by statute. Desequestration likewise is not authorized by statute. It has been said that

[i]n exercising this discretion it is for the trial court to weigh concern for the prompt, orderly administration of criminal law against the possibility of jury prejudice in a given case. State v. Brisson, 124 Vt. 211, 214, 201 A.2d 881 (1964).

The Brisson court went on to state that the mere passage of time between impanelling and service could itself magnify the effect of otherwise minor incidents. Given the scope of discretion inherent to the court, particularly in a setting involving separation during the evidence taking, the court could well anticipate a higher court finding the existence of circumstances capable of prejudicing the deliberate function of the jury. State v. White, 129 Vt. 220, 227, 274 A.2d 690 (1971). This same problem was examined in State v. Lawrence, 70 Vt. 524, 530, 41 A.1027 (1898). There the court found that the temporary absence of a juror did not constitute grounds for a mistrial. The opinion continued with

the caveat that "if anything was disclosed showing a reasonable cause to believe that the separation of the jury has given rise to any improper practice or prejudicial misconduct, the verdict should be set aside." State v. Lawrence, supra at 531. The impropriety of separation comes more clearly into focus when the duration of separation greatly outlasts the time during which testimony is taken.

The Second Circuit panel has also determined that the trial judge failed to exercise his discretion in a sound manner. The State considers this conclusion erroneous given the recent opinions of the United States Supreme Court. In Arizona v. Washington, supra, in commenting on improper defense counsel tactics, the Court found that

[t]he interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that anytime a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore would seriously impede the trial judge in the proper performance of his duty.... Arizona v. Washington, supra at 4131.

In Arizona v. Washington, supra at 4132, the Court concluded that the trial judge exercised sound discretion when "he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. This conclusion is especially interesting when one considers that a cautionary instruction might have been utilized in Arizona as an alternative to a mistrial.

This same outlook on discretion emerges in Illinois v. Somerville, 410 U.S. 458, 462, 93 S.Ct. 1066 (1973), wherein the Court cites with approval the opinions in Wade v. Hunter, supra and Gori v. United States, supra in support of the view that broad discre-

tion is reserved to the trial judge who is in the best position "to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a trial."

While the Jorn court initially determined that the trial judge must consider the alternatives, often supplied by counsel, to a mistrial, it is equally clear that the trial judge is free to reject these suggestions as inadequate to cure the situation. United States v. Grasso, 552 F.2d 46, 54 (2nd Cir. 1977). Unlike the Grasso case, which came down after Judge Valente declared the mistrial, in the instant situation the trial judge invited and heard both sides views on the need for mistrial. Given the Court's determination that there need not be explicit findings when the record discloses a sufficient justification for the state court ruling, Arizona v. Washington, supra at 4132, in the case at the bar the judge acted properly in the exercise of sound discretion.

Given the origin of the problem in this case, the inherent policy reasons behind the Double Jeopardy Clause become inapposite. As discussed in Scott v. United States, ___ U.S. ___, 23 Cr. L. 3119 (1978), the concerns voiced by the Court in Green v. United States, 355 U.S. 184, 187 (1957) relating to the weighty State bearing down on the relatively helpless and anxious defendant should be considered in a narrow context. The Double Jeopardy Clause becomes attenuated when the Government is not "relentlessly pursuing a defendant who had either been found not guilty...." Scott v. United States, supra at 3123. In this setting the conduct of the court and the State comported with the idea of fairness.

The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible.... In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to trial again. Wade v. Hunter, supra at 688-89.

In balancing society's interest in the punishment of the crime against the rights of the accused in having final resolution of his case, there should be a relaxation of scrutiny in contexts where no fault is assignable to the cause of the trial error or trial disruption. As advanced in Arizona v. Washington, supra at 4130, the Court declared that the prosecution deserves one complete opportunity to convict those who have violated its laws, particularly when the cause of the mistrial is not attributable to the prosecution. The Court expressed that a spectrum of trial problems exists and that along this spectrum varying standards of appellate scrutiny become appropriate in considering a trial judge's decisions. The opinion goes on to state that since the extent of bias cannot be measured, even when a mistrial is not strictly "necessary," the trial judge is in the best position to choose between alternative courses of conduct.

CONCLUSION

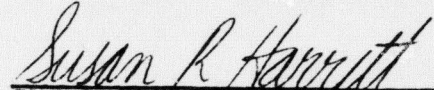
In light of the reasons and argument contained herein, it

is prayed that this petition for rehearing be granted.

Respectfully submitted,

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By:


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CERTIFICATE

As counsel for the appellees, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Susan R. Harritt

SUSAN R. HARRITT
Assistant Attorney General
Attorney for Appellees

PROOF OF SERVICE

The undersigned, Susan R. Harritt, attorney for the appellees herein, hereby certifies that on June 26, 1978, she served the foregoing petition for rehearing, by mailing two copies thereof, by ordinary mail, postage prepaid, addressed to the attorney for the appellant, James L. Morse, Esq., Defender General, 141 Main Street, Montpelier, Vermont 05602.

Dated at Montpelier, County of Washington, State of Vermont, this 26th day of June, 1978.

Susan R. Harritt

SUSAN R. HARRITT
Assistant Attorney General
Attorney for Appellees

